IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MYLAN LABORATORIES INC., et al.,	)	
	)	
Plaintiffs,	)	
vs.	)	Civil Action No: 07 C 69
	)	
AMERICAN MOTORISTS INSURANCE CO., et al.,	)	
	)	
Defendants	)	

ORDER GRANTING DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON THE DUTY TO DEFEND AND DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON THE DUTY TO DEFEND

The above styled matter came before the Court pursuant to the following motions:

1. The Motion for Partial Summary Judgment Regarding Duty to Defend Lorazepam and Clorazepate Litigation filed on or about May 5, 2007 by Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc., and UDL Laboratories, Inc. (collectively "Plaintiffs" or "Mylan");

2. The Motion for Partial Summary Judgment Regarding Duty to Defend Average Wholesale Price Litigation filed on or about May 5, 2007 by Plaintiffs;

3. The Motion for Summary Judgment Regarding the Duty to Defend the Average Wholesale Price Litigation filed on or about June 21, 2007 by American Motorist Insurance Company ("AMICO");

4. The Cross-Motion for Partial Summary Judgment on the Duty to Defend the AWP Lawsuits filed on or about June 21, 2007 by Continental Insurance Company ("Continental")

5. The Motion for Summary Judgment on the Issues of "Duty to Defend" filed on or about June 21, 2007 by Wausau Insurance Company ("Wausau");

6. The Cross-Motion for Partial Summary Judgment on the Duty to Defend the L&C Lawsuits filed on or about June 21, 2007 by Federal Insurance Company ("Federal"); and

7. The Cross-Motion for Partial Summary Judgment on the Duty to Defend the AWP Lawsuits filed on or about June 21, 2007 by Federal and AMICO.

Prior to ruling on the foregoing motions, the Court heard oral arguments of counsel, reviewed the parties' motions and the memoranda of law in support thereof, the opposition briefing, the reply briefing, the court file, and the pertinent legal authorities. Having reviewed those items, the Court does hereby **GRANT** AMICO's, Continental's, Wausau's, and Federal's motions on the duty to defend and **DENY** Plaintiffs' motions on the duty to defend.

I. STANDARD OF DECISION

The traditional standard for granting summary judgment is set out in Syllabus Point 3 of *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963), wherein the court held: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Rule 56 of the West Virginia Rule of Civil Procedure is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, 'if there essentially is no real dispute as to salient facts' or if it only involves a question of law." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). As noted in *Williams*, the function of the circuit court at the summary judgment stage "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* at 336, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995), the court held that "on summary judgment, a circuit court must make factual findings sufficient to permit meaningful appellate review." *Id.* at 180. *Gentry* instructs that an order granting summary judgment cannot

merely recite and rest exclusively upon a conclusion that, "[n]o genuine issue of material fact is in dispute and therefore summary judgment is granted." *Fayette County Nat'l Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232, 236 (1997). Accordingly, this Court makes the Factual Findings and Conclusions of Law set forth below.

II. FACTUAL FINDINGS

A. The Insurers' Policies

1. AMICO issued the following policies to Mylan Laboratories, Inc.: (1) policy number 3YM 851 972-01, effective July 1, 1991 to July 1, 1992; and (2) policy number 3YM 851 972-02, effective July 1, 1992 to September 1, 1993 (collectively the "AMICO Policies").

2. The AMICO Policies are primary general liability policies with limits of liability of $1,000,000.

3. The AMICO Policies contain the following terms and conditions:

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. We may, at our discretion, investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS -- COVERAGES A AND B.

b. This insurance applies to:

(1) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

(2) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period.

SECTION V – DEFINITIONS

1. "Advertising injury" means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan.

4. Continental issued the following policies to Mylan Laboratories, Inc.: (1) policy number 15CBP06156061-94, effective September 1, 1993 to September 1, 1994; and (2) policy number 15CBP06156061-95, effective September 1, 1994 to September 1, 1995 (collectively the "Continental Policies").

5. The Continental Policies are primary general liability policies with limits of liability of $1,000,000.

6. The Continental Policies contain the following terms and conditions:

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of the "personal injury" or "advertising injury" to which this coverage part applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

b. This insurance applies to:

***

(2) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period.

Section V.1 defines "Advertising injury" as follows:

"Advertising injury" means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan.

7. Wausau issued the following policies to Mylan Laboratories, Inc.: (1) policy number 0526-00-101388, effective September 1, 1995 to September 1, 1996; (2) policy number 0527-00-101388, effective September 1, 1996 to September 1, 1997; (3) policy number 0528-00-101388, effective September 1, 1997 to September 1, 1998; (4) policy number 0529-00-101388, effective September 1, 1998 to September 1, 1999; (5) policy number 0520-00-101388, effective September 1, 1999 to September 1, 2000; and (6) and policy number 0521-00-101388, effective September 1, 2000 to September 1, 2001 (collectively the "Wausau Policies").

8. The Wausau policies are primary general liability policies with limits of liability of $1,000,000.

9. Wausau policy number 0526-00-101388 contains the following terms and conditions:

> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement.**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and
>
> (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medial expenses under Coverage C.
>
> No other obligation or liability to pay sums or perform acts or

services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) the "bodily injury" or "property damage" occurs during the policy period.

c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

SECTION V – DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful condition.

Personal and Advertising Injury Liability Coverage Amendment Endorsement

This endorsement modifies insurance provided under the following: ...

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insurance Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. We may, at our discretion, investigate any offense which may result in "personal injury" or "advertising injury" and settle any claim or "suit" which may result; but:

(1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under this insurance.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGE A AND B.

b. This insurance applies to "personal injury" or "advertising injury" only if:

(1) The "personal injury" or "advertising injury" arises out of an offense committed in the "coverage territory;" and

(2) The "personal injury" or "advertising injury" arises out of an offense committed during the policy period.

B. SECTION V – DEFINITIONS, paragraphs 1. is deleted and replaced by the following:

1. "Advertising injury" means injury, other than "bodily injury" or "property damage" or "personal injury," arising out of one or more of the following offenses committed in the course of "your advertising activities":

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas; or

d. Infringement of copyright, title or slogan.

D. SECTION V – DEFINITIONS is amended to include the following definition:

"Your advertising activities" means wide spread distribution of material promoting your goods, products or services.

10. Wausau policy numbers 0527-00-101388, 0528-00-101388, 0529-00-101388, and 0520-00-101388 contain the following terms and conditions:

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. **Insuring Agreement.**

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

      (1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and

      (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medial expenses under Coverage C.

   No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

   b. This insurance applies to "bodily injury" and "property damage" only if:

      (1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

      (2) the "bodily injury" or "property damage" occurs during the policy period.

   c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

SECTION V – DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful condition.

Personal and Advertising Injury Liability Coverage Amendment Endorsement

This endorsement modifies insurance provided under the following:

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insurance Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury" or "advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" or offense which may result in "personal injury" or "advertising injury" and settle any claim or "suit" which may result; but:

(1) The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under this insurance.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGE A AND B.

b. This insurance applies to "personal injury" or "advertising injury" only if:

(1) The "personal injury" or "advertising injury" arises out of an offense committed in the "coverage territory;" and

(2) The "personal injury" or "advertising injury" arises out of an offense committed during the policy period.

B. SECTION V – DEFINITIONS, paragraph 1, is deleted and replace by the

following:

1. "Advertising injury" means injury, other than "bodily injury" or "property damage" or "personal injury," arising out of one or more of the following offenses committed in the course of "your advertising activities":

   a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;

   b. Oral or written publication of material that violates a person's right of privacy;

   c. Misappropriation of advertising ideas; or

   d. Infringement of copyright, title or slogan.

D. SECTION V – DEFINITIONS is amended to include the following definition:

"Your advertising activities" means wide spread distribution of material promoting your goods, products or services.

11. Wausau policy number 0521-00-101388 contains the same policy language as the 0527-00-101388 through 0520-00-101388 policies, with the exception of the following additional provision:

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" which may result. But:

   (1) The amount we will pay for damages is limited as described in SECTION III – LIMITS OF INSURANCE;

and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

B. SECTION V – DEFINITIONS

1. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right to private occupancy of a room, dwelling, or premises that a person occupies by or on behalf of its owner, landlord or lessor;

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;

e. Oral or written publication of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

12. Federal issued policy number 7966-70-27 to Mylan Laboratories, Inc. for the following policy periods: (1) September 1, 1997 to September 1, 1998; (2) September 1, 1998 to

September 1, 1999; (3) September 1, 1999 to September 1, 2000; and (4) September 1, 2000 to September 1, 2001 (collectively the "Federal Policies").

13. The Federal Policies are umbrella liability polices. The September 1, 1997 to September 1, 1998 policy has limits of liability of $10,000,000 in excess of $1,000,000. The remaining policies have limits of liability of $20,000,000 in excess of $1,000,000.

14. The Federal Policies contain the following terms and conditions:

Insuring Agreements

Coverage A - Excess Follow Form Liability Insurance

Under Coverage A, we will pay on behalf of the **insured**, that part of loss covered by this insurance in excess of the total applicable limits of **underlying insurance**, provided the injury or offense takes place during the Policy Period of this policy. The terms and conditions of **underlying insurance** are with respect to Coverage A made a part of this policy, except with respect to:

A. any contrary provision contained in this policy; or

B. any provision in this policy for which a similar provision is not contained in underlying insurance.

With respect to the exceptions stated above, the provisions of this policy will apply.

The amount we will pay is limited as described in Limits of Insurance.

Notwithstanding anything to the contrary contained above, if **underlying insurance** does not cover **loss**, for reasons other than exhaustion of an aggregate limit of insurance by payment of claims, then we will not cover such **loss**.

We have no obligation under this insurance with respect to any claim or **suit** settled without our consent.

If we are prevented by law from paying on behalf of the **insured** for coverage provided under this insurance, then we will indemnify the **insured**.

Coverage B - Umbrella Liability Insurance

Under Coverage B, we will pay on behalf of the **insured**, damages the insured becomes legally obligated to pay by reason of liability imposed by law or

assumed under an **insured contract** because of **bodily injury**, **property damage**, **personal injury**, or **advertising injury** covered by this insurance which takes place during the Policy Period of this policy and is caused by an **occurrence**. We will pay such damages in excess of the Retained Limit Aggregate specified in Item 4 d. of the Declarations or the amount payable by other insurance, whichever is greater.

Damages because of **bodily injury** include damages claimed by any person or organization for care or loss of services resulting at any time from the **bodily injury**.

The coverage applies anywhere.

The amount we will pay is limited as described in Limits of Insurance.

Coverage B will not apply to any loss, claim or **suit** for which insurance is afforded under **underlying insurance** or would have been afforded except for the exhaustion of the limits of insurance of **underlying insurance**.

We have no obligation under this insurance with respect to any claim or **suit** settled without our consent.

If we are prevented by law from paying on behalf of the insured for coverage provided under this insurance, then we will indemnify the **insured**.

Defense and Supplementary Payments

Applicable to Coverage A and Coverage B

A. We will have the right and the duty to assume control of the investigation, settlement or defense of any claim or **suit** against the **insured** for damages covered by this policy:

1. under Coverage A, when the applicable limit of **underlying insurance** has been exhausted by payment of claims; or

2. under Coverage B, when damages are sought for **bodily injury**, **property damage**, **personal injury** or **advertising injury** to which no **underlying insurance** or **other insurance** applies.

Limits of Insurance

Applicable to Coverage A Only

A. With respect to Coverage A and subject to paragraphs B.1., B.2. and B.3. above:

1. if the limits of **underlying insurance** have been reduced by payment of **loss**, this policy will droop down to become immediately excess of the reduced underlying limit; or

2. if the limits of **underlying insurance** have been exhausted by payment of **loss**, this policy will continue in force as **underlying insurance**.

The provisions of A.1. and A.2. above apply to injury or offense which takes place before the expiration of this policy or the underlying policy, whichever comes first.

Definitions

Applicable to Coverage B Only

Advertising injury means injury, other than **bodily injury** or **personal injury**, arising solely out of one or more of the following offenses committed in the course of **advertising** your goods, products or services:

1. oral or written publication of **advertising** material that slanders or libels a person or organization;

2. oral or written publication of **advertising** material that violates a person's right of privacy; or

3. infringement of copyrighted titles, slogans or other **advertising** materials.

Advertising means any paid: advertisement, publicity article, broadcast or telecast.

Bodily Injury means physical injury, sickness or disease to a person and, if arising out of the foregoing, mental anguish, mental injury, shock or humiliation, including death at any time resulting therefrom.

Occurrence means: ...

1. with respect to **bodily injury** or **property damage** liability, an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

2. with respect to **personal injury** or **advertising injury**, a covered offense. All damages that arise from the same act, publication or general conditions are considered to arise out of the same occurrence, regardless of the

frequency or repetition thereof, the number or kind of media used or the number of claimants.

Personal injury means injury, other than **bodily injury**, arising out of one or more of the following offenses committed in the course of your business, other than your advertising:

1. false arrest, detention or imprisonment;

2. malicious prosecution;

3. the wrongful eviction from, wrongful entry into, r invasion of the right of private occupancy of a room, dwelling or premises that a person or persons occupy, by or on behalf of its owner, landlord or lessor;

4. oral or written publication of material that slanders or libels a person or organization;

5. oral or written publication of material that violates a person's right of privacy, or

6. discrimination (unless insurance thereof is prohibited by law).

15. In addition, the September 1, 2000 to September 1, 2001 policy contains the following endorsement deleting the "personal injury" coverage:

Endorsement
Personal Injury Exclusion Coverage B

THIS POLICY IS SUBJECT TO THE FOLLOWING ENDORSEMENT

Under "Exclusions", "Applicable to Coverage B Only", the following exclusion is added:

Personal Injury

Under Coverage B, this insurance does not apply to **personal injury**.

It is agreed that, with respect to Coverage B, all references in the policy to **personal injury** are deleted and no coverage is provided.

All other terms and conditions remain unchanged.

B. THE AWP LITIGATION

16. The Complaint in this action identifies certain lawsuits filed against Plaintiffs and known as the "Average Wholesale Price Litigation" or "AWP Actions." In July 2002, the first of these lawsuits was filed against Mylan. That lawsuit, brought by John Rice as representative of a putative class of patients and third-party payors (*i.e.* insurers who pay for their insureds' prescription drugs) in California who purchased Mylan's products from January 1, 1995 to the date of filing, was filed in Superior Court of Alameda County ("Rice Lawsuit"). The key allegations in the Rice Complaint include the following:

> 4. Sales of prescription drugs have exploded. Pharmaceutical companies' earnings in the last 10 years have skyrocketed. In 1991, the prices of the 50 drugs most commonly prescribed for the elderly rose at three times the inflation rate. A September 2001 report by the United State General Accounting Office entitled "Payments for Covered Outpatient Drugs Exceed Providers' Cost" found that pharmaceutical companies were engaged in a pattern and practice of providing prescription drugs to physicians or hospitals at discounts from the AWP. The physicians and hospitals are then reimbursed at the AWP – receiving more than they had actually paid for the drugs. The GAO estimates that Medicare's payments for physician-billed drugs were at least $532 million more than the actual cost to the physicians and hospitals. This was done so that the pharmaceutical companies could exercise control over what drugs would be prescribed. The practice is known as "marketing the spread." ...
>
> 70. Medicare reimburses physicians and other providers of drugs based on the AWP. AWPs are published for each drug identified by a National Drug Code ("NDC"). Manufacturers periodically report AWPs for NCDCs to publishers of drug pricing data, such as the Medical Economics Company, Inc., which publishes the Red Book, or First Data Bank, which compiles the National Drug Date File. Publishers of AWPs and other drug prices state that they list the prices as reported to them by the manufacturers. Publishers such as First Data Bank, Red Book, Blue Book, and Medispan do not set the AWP; instead, the defendants claim to "self-police" and "self-report" the AWP to the third-party publications, which then publish the purported AWP, as provided to them by the defendants. Although publishers try to update AWPs at least on an annual basis, there is no rule governing the frequency with which manufacturers report AWPs to the publishers. The contractors responsible for paying Part B claims, known as Medicare carriers, use the published AWPs to determine the Medicare allowed amount, or payment level, which is 95 percent of the AWP for each HCPCSO-coded drug.

71. Federal regulation and industry and state practice are that reimbursement for defendants' products is based primarily upon the reported AWP. Thus, defendants are able to manipulate the prices which they will be paid by provided false and inaccurate information to the third-party publications which publish AWP.

72. Physicians and pharmacies purchase the prescription drugs for which they are reimbursed either directly from the pharmaceutical manufacturer or indirectly through wholesalers. Physicians are generally able to obtain drugs at prices much below the Medicare reimbursement level because wholesalers and GPOs make the drugs available to physicians at considerably lower price than the AWPs use to establish the Medicare payment. Most drugs are regularly obtained at rates 13 to 34 percent below the AWPs, while other drugs are subject to even more drastically lower rates. In addition, those physicians who are low volume billers for oncology drugs are also able to purchase these drugs for considerably less than Medicare's payment. Physicians are also paid separately for providing services associated with drug administration under the Medicare physician fee schedule.

73. Government investigations have recently revealed that defendants and others have engaged in a scheme to fraudulently manipulate the AWP for certain prescription pharmaceuticals including but not limited to prescription pharmaceuticals covered by Medicare and Medicaid. As part of the scheme, each Defendant reported an AWP which materially misrepresented the actual prices paid to Defendants by physicians and pharmacies for prescription drugs.

74. Upon information and belief, Plaintiff alleges that the purported AWP reported by the defendants usually bears little or no relationship to the price actually paid by physicians and pharmacies.

75. In addition, while federal Medicaid law requires the defendants to provide quarterly rebates to the State of California if they charge the State more than the lowest of "best price" offered to any commercial customer, the defendants routinely failed to do so as a direct result of the AWP Scheme.

76. Defendants' fraudulent and illegal manipulation of the AWP cost consumers hundreds of millions of dollars, representing illegal profits to the Defendants. These profits have been earned at the expense of consumers. Elderly Californians on Medicare bear a disproportionate burden as they make payments or co-payments based on the fictitious AWP charges.

77. Upon information and belief, Defendants charge non-Medicare providers the same AWP prices pursuant to their general scheme, thus subjecting even consumers who are not on Medicare to their exaggerated charges.

78. Defendants' actions are intentional. ...

The Rice Complaint also alleges that Mylan "fraudulently manipulated AWP ... in order to unjustly enrich [itself] at the expense of consumers and the government" and "engaged in a pattern and course of conduct by which [it] intentionally report[s] fictitious and inflated costs which are based on little more than [its] desire to sell more of [its] products and to exclude competitors." Based upon these allegations, the Rice Complaint asserts a single claim for relief based upon Violations of California Business and Professions Code §§17200 et seq.

17. Several States also sued Mylan for fraudulent conduct. For example, the State of Florida, through its Office of the Attorney General, Medicaid Fraud Control Unit, sued Mylan in July 2005 based upon Mylan's knowingly false AWPs from July 1, 1994 to the date of filing ("State of Florida Lawsuit"). The Complaint in the State of Florida Lawsuit again alleged how Mylan fraudulently reported inflated AWPs, and further identified Mylan's motivation for doing so as a desire to increase its market share by "marketing the spread" between the reported AWP and the true acquisition cost:

> 26. The Florida Medicaid Program reimburses providers for the drugs they dispense to Medicaid recipients at EAC [estimated acquisition cost]. Florida Medicaid determines EAC by using the AWPs and WACs [wholesaler acquisition costs] supplied by pharmaceutical manufacturers to First DataBank. The Defendants knowingly misrepresented AWP and WAC prices solely for the purpose of illicit financial gain in an attempt to manipulate and control the market share of the Subject Drugs.
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> 27. The Defendants knowingly and intentionally made false representations of prices and costs for certain of their drugs to the Florida Medicaid Program. The Defendants reported, and caused First DataBank to report, prices for the Subject Drugs that substantially exceeded the market prices known to the Defendants from their own business information. The Defendants knew that reporting false, inflated AWP and WAC prices for the Subject Drugs would cause Florida Medicaid Program's estimates of the acquisition costs of the Subject Drugs to substantially exceed any reasonable estimates of the acquisition costs of those drugs.
>
> 28. The Defendants knowingly and intentionally created a price spread

(hereinafter "spread") for several of their drugs by supplying to First DataBank prices for those drugs far in excess of the prices for which the drugs were sold. The Defendants intended the Florida Medicaid Program to use those false, inflated prices in setting provider reimbursement rates, and in fact the Florida Medicaid Program did use those false inflated prices to set Medicaid reimbursement rates. As a direct result of its utilization of the false prices supplied by the Defendants, the Medicaid Program paid provider claims for the Subject Drugs dispensed in amounts far in excess of the acquisition costs generally or currently available in the marketplace for the specified drugs.

29. After creating the price spreads for their drugs, Defendants enlarged those spreads by reducing acquisition costs to providers without disclosing the reductions to First DataBank or to the Florida Medicaid Program. Price reductions were accomplished by giving providers financial incentives such as discounts, rebates, off-invoice pricing, free goods, and cash payments. Price reductions were granted to some retail pharmacy chains, wholesalers, buying group or pharmacy benefit managers. Defendants knowingly utilized these financial incentives to reduce the effective acquisition prices of their drugs, while knowingly reporting AWPs and WACs to First DataBank that were not reflective of the price reductions.

30. After maximizing the spread on their drugs, Defendants engaged in a tactic commonly referred to as "marketing the spread," for the purpose of increasing their market share and maximizing their profits. Providers were induced to buy the Subject Drugs at issue because the Medicaid reimbursements for such drugs, unlike otherwise-identical competing drugs with little or no price spread, far exceeded the providers' acquisition cost generally or currently available in the marketplace. The Defendants actively marketed the spread through sales presentations, bid proposals, advertising, and various pharmacy inventory software programs specifically to increase their market share and profits.

The State of Florida complaint states counts for Violation of the Florida False Claims Act and Common Law Fraud.

18. The City of New York and many Counties in the State of New York filed AWP Lawsuits as well. The lawsuit filed by the County of Albany on or about April 5, 2005 ("County of Albany Lawsuit") is representative of these suits and alleges:

1. Albany brings this action against the defendant manufacturers of prescription drugs to recover monetary damages, and for civil penalties, declaratory and injunctive relief, disgorgement of profits, and treble and punitive damages suffered by it and by the State and federal governments from 1992 to the

present as a result of defendants' fraudulent and misleading schemes that overcharge the New York State Medicaid program ("Medicaid program") for prescription drugs bought on behalf of Albany residents who receive Medicaid benefits. ...

8. Defendants provide grossly inflated pricing information to the publishing services, causing them in turn to publish similarly inflated AWPs. Their purpose in doing so is to create a large spread between the actual price that providers such as pharmacists pay to acquire drugs and the reimbursement that those same entities receive from Medicaid, Medicare and private third party payors. Defendants advertise this spread as a reason why those in the distribution chain should sell their drugs, a practice is known as "marketing the spread." The spread is an incentive, in effect a bribe, to any in the distribution chain – pharmacy chains, PBMs, insurers – who are able to increase demand for a defendant's drugs and to select that defendant's drugs over competing drugs. Through defendants' manipulation of AWP, they induce the Medicaid program, as well as Medicare and private payors, to pay this unlawful incentive for the purchase of defendants' products. ...

15. Defendants unlawfully reduce the amounts of rebates that they pay to the states for brand name drugs by omitting from their computations of Best Price statutorily and contractually required information. For example, defendants omit from their rebate calculations routine discounts, such as volume discounts, the customary two-percent prompt pay discount, chargebacks, rebates, free samples and other off-invoice transactions and inducements offered to create market share and demand for their product. The U.S. Senate is currently investigating defendants' omissions of certain discounted commercial sales, which defendants unlawfully seek to shoehorn within the "nominal price" exception to the Best Price calculations. Defendants also fail properly to allocate discounts in bundled sales (*i.e.*, sales whereby a variety of defendants' drugs are sold for a single bundled price).

The County of Albany Lawsuit also alleges that Mylan has breached contracts requiring Mylan to correctly calculate and pay certain rebates to the State and the Counties:

92. The second component of the price that Medicaid pays for prescription drugs is determined by the federally mandated rebate provision. Under the Medicaid rebate provision, 42 U.S.C. § 1396r-8, a manufacturer of a drug that wishes to have its products paid for by Medicaid must enter into a rebate agreement with the Secretary of Health and Human Services. ...

108. Each and defendant and the Secretary of Health and Human Services "on behalf of the Department of Health and all States and the District of Columbia ... which have a Medicaid State Plan approved under 42 U.S.C. § 1396a" has executed a Rebate Agreement that is in all material respects identical to the Model

Rebate Agreement. ...

593. At the time each defendant entered into a Rebate Agreement, the Secretary of HHS expressly had approved New York State's Medicaid plan, including these provisions that authorize local social service districts, like Albany, to sue for Medicaid fraud and that expressly impose a 25% contribution on Albany. ...

595. Albany, like New York State, was an intended third-party beneficiary of these rebate agreements. ...

597. As set forth herein, contrary to the express requirements of the Rebate Agreements, each defendant did not report accurate Best Prices for its drugs or pay correct Medicaid rebates.

598. Rather, each defendant reported false and inflated Best Prices that, among other things, excluded routine discounts including prompt pay and bundled discounts, rebates, chargebacks and other inducements and incentives offered to drug selecting entities to create market share, and abused the nominal price exception.

599. Defendants have therefore breached their rebate agreements and caused massive foreseeable damage to Albany, an intended third-party beneficiary of the rebate agreement.

The County of Albany Lawsuit states counts for Failure to Comply with Federal Medicaid Statute Rebate Provision, Failure to Comply with State Medicaid Rebate Provision, Obtaining Public Funds by False Statements, Violation of New York State Department of Health Regulations, Breach of Contract, Unfair Trade Practices, Fraud, and Unjust Enrichment. The suits by the City of New York and Counties of the State of New York are basically no different than the suits by consumers and the States described above.

19. The AWP suit brought by the State of Illinois includes allegations that Mylan used a variety of business practices to conceal the actual AWP from the States and, thereby, avoid detection and continue its fraudulent scheme of creating and marketing a spread between the reported AWP and the actual AWP:

57. Defendants have been able to succeed in their drug-pricing scheme for more than a decade by exacerbating the complexities of the incredibly huge, and

dauntingly complex, drug market, and by purposely concealing their scheme from Illinois and other payers, as set forth below.

58. The published wholesale price of over 65,000 NDC-numbered drugs may, and often does, change at any time. As a consequence, just to track the current published prices of drugs utilized by a state's citizens requires resources and expertise that most states do not have.

59. Defendants have further exacerbated the inherent complexities of the drug market by utilizing marketing schemes which conceal the true price of their drugs in several different ways.

60. First, defendants sell their drugs in a unique manner which hides the true price of their drugs. This scheme works as follows. Upon agreeing on a quantity and price of a drug with a provider, or group of providers, the defendants purport to sell the agreed-upon drugs to wholesalers with whom they have a contractual arrangement, at the WAC [wholesale acquisition cost] price. The WAC may be, and usually is, higher than the price agreed upon by the provider and the drug manufacturer. The wholesaler then ships the product to the provider, charging the provider the (lower) price originally agreed upon by the drug manufacturer and the provider. When the wholesaler receives payment from the provider, it charges the manufacturer the price for handling and any applicable rebates and discounts, and sends a bill to the manufacturer, called a "charge-back, for the difference between the WAC and the price actually paid by the provider. These charge-backs (or shelf adjustments, or other economic inducements) are kept secret, so that it appears that the wholesaler actually purchased the drug at the higher WAC price. The effect of this practice is to create the impression that the "wholesale price" of the drug is higher than it really is.

61. Second, defendants further inhibit the ability of Illinois and other ultimate purchasers to learn the true cost of their drugs by insisting upon confidentiality provisions in their sales agreements with providers, terming them trade secrets and proprietary, to preclude providers from disclosing to others the prices they paid.

62. Third, defendants further obscure the true prices for their drugs with their policy of treating different purchasers differently. Thus, for the same drug, pharmacies are given one price, hospitals another, and doctors yet another.

63. Fourth, at least some defendants have hidden their real drug prices by providing free drugs and phony grants to providers as a means of discounting the overall price of their drugs. For example, defendant TAP had pled guilty to a federal criminal indictment for engaging in such conduct, as have defendants AstraZeneca, Pfizer, and Schering-Plough.

64. Defendants have concealed or refused to disclose their motive for utilizing

an inflated AWP from the public. Only with the disclosure of materials secured by litigants in recent discovery has it become apparent that at least one reason defendants were intentionally manipulating the nation's drug reimbursement system was to compete for market share on a basis of phony price spread instead of the true selling price of their drugs or the medicinal value of these drugs by their users.

65. Defendants have further concealed their conduct by ensuring that all of the entities purchasing drugs directly from defendants (and, hence, knowledgeable about the true price of their drugs) have had an incentive to keep defendants' scheme secret. Defendants' scheme permits all providers, including but not limited to pharmacies, physicians, and hospitals/clinics, to make some profit off defendants' inflated spread, because all of them are reimbursed on the basis of the AWP for at least some of the drugs they sell or administer. For providers, therefore, the greater the difference between the actual price and the reported AWP, the more money the make.

66. Defendants have continuously concealed the true price of their drugs and continued to publish deceptive AWPs and WACs as if the prices were real, representative prices.

C. THE L&C LITIGATION

20. The Complaint in this action identifies certain lawsuits filed against Plaintiffs and known as the "L&C Litigation." On December 22, 1998, the Federal Trade Commission ("FTC") filed the first L&C Litigation suit, captioned *Federal Trade Commission v. Mylan Laboratories, et al.*, Case No. 1:98-CV-3114, in the United States District Court for the District of Columbia ("FTC Action"), alleging that Mylan and other defendants engaged in unfair methods of competition in or affecting commerce in violation of Section 5(a) of the FTC Act. The key allegations in the FTC Complaint are as follows:

19. In 1997, Mylan embarked on a strategy to raise the price, and thereby increase the profitability of some of its generic drugs by seeking from its API suppliers, long-term exclusive licenses for the DMFs of certain APIs selected by Mylan because of limited competition. If Mylan obtained such an exclusive license, no other generic drug manufacturer could use that supplier's API to make the drug in the United States. Mylan sought these exclusive licenses because it believed that such contracts, by denying its competitors access to the APIs, would exclude some or all or them from the generic drug market, making it easier for Mylan to raise prices.

20. In determining the drugs on which to seek exclusive licenses, Mylan considered drugs with relatively few ANDAs and DMFs on file with the FDA, because such drugs had fewer competitors at the API and tablet levels. Ultimately, Mylan sought exclusive licenses for the DMFs for lorazepam API and clorazepate API as well as one other drug which is not the subject of this complaint.

21. Mylan began negotiating for exclusive licenses with Profarmaco and its distributor Gyma, which sold lorazepam and clorazepate APIs to Mylan. ...

22. ... At this time, Profarmaco (through Gyma) was the only source selling lorazepam and clorazepate API to generic manufacturers in the United States. FIS, which previously had supplied the U.S. market with lorazepam API, recently had exited the market because it no longer had any customers. With complete control of Profarmaco's supply of these products, and by refusing to sell any to its competitors, Mylan could deny its competitors access to the most important ingredient for producing lorazepam and clorazepate tablets. ...

25. Profarmaco and Gyma signed the ten year exclusive agreements licensing the two DMFs to Mylan on November 14, 1997. Through these agreements, Mylan obtained control over the supply of Profarmaco's APIs for lorazepam and clorazepate in the United States, denying Mylan's competitors (particularly Gyma's customers Watson and Purepac) access to these essential raw materials. In 1997, Profarmaco, though Gyma, supplied over 90% of the lorazepam API and 100% of the clorazepate API to generic manufacturers in the United States market. ...

28. On or around January 12, 1998, despite no significant increase in its costs, Mylan raised its price of clorazepate tablets to State Medicaid programs, wholesalers, retail pharmacy chains, and other customers by amounts ranging approximately from 1,900 percent to over 3,200 percent, depending on the bottle size and strength. For example, a 500 count bottle of 7.5 mg clorazepate tablets increased in price approximately from $11.36 to $377.00. On or around March 3, 1998, despite no significant increase in its costs, Mylan raised its price of lorazepam tablets by amounts ranging approximately from 1,900 percent to over 2,600 percent, depending on the bottle size and strength. For example, a 500-count bottle of 1 mg lorazepam tablets increased in price approximately from $7.30 to $191.00. The ultimate retail price to consumers was even higher. Mylan's competitors matched these price increases for lorazepam and clorazepate tablets. ...

30. As a result of these substantial and unprecedented price increases for lorazepam and clorazepate tablets, many purchasers, including pharmacies, hospitals, insurers, managed care organizations, wholesalers, government agencies, and others, have paid substantially higher prices. Moreover, some

> patients may have stopped taking lorazepam and clorazepate tablets altogether, or been forced to reduce the quantity they take, because they can not afford them.

In addition, the FTC alleged that Mylan "acted with a specific intent to monopolize, and to destroy competition," "devised and implemented a calculated campaign to raise the price and profitability" of its products, "enter[ed] into a conspiracy to monopolize," "willfully acquired its monopoly power," and "willfully engaged in a course of exclusionary conduct in order to obtain a monopoly."

21. Based upon these allegations, the FTC asserted eight causes of action: (1) Agreement in Restraint of Trade on Lorazepam; (2) Agreement in Restraint of Trade on Clorazepate; (3) Conspiracy to Monopolize Generic Lorazepam Tablets Market; (4) Conspiracy to Monopolize Generic Clorazepate Tablets Market; (5) Monopolization of Generic Lorazepam Tablets Market; (6) Attempted Monopolization of Generic Lorazepam Tablets Market; (7) Monopolization of Generic Clorazepate Tablets Market; and (8) Attempted Monopolization of Generic Clorazepate Tablets Market. The FTC requested that the court (a) find that Mylan violated Section 5(a) of the FTC Act; (b) permanently enjoin Mylan from engaging in such conduct; (c) rescind Mylan's unlawful licensing arrangements; and (d) order other equitable relief, including disgorgement and restitution in an amount exceeding $120 million plus interest.

22. On December 22, 1998, thirty-two states, through their Attorneys General, sued Mylan and others in *State of Connecticut, et al. v. Mylan Laboratories, et al.*, Case No. 1:98-CV-3115, filed in the United States District Court for the District of Columbia ("State Attorneys General Action"), alleging violations of Sections 1 and 2 of the Sherman Act, in addition to various states' antitrust laws. The substantive allegations in the State Attorneys General Action are materially identical to those of the FTC Action, with the exception of an additional ninth count, which alleges that Mylan entered into an illegal price fixing agreement. Also, the State

Attorneys General Complaint includes a section titled "Injury," which alleges:

> 104. As a direct and proximate result of the unlawful conduct alleged above, the States were not able to purchase lorazepam and clorazepate at prices determined by free and open competition, and consequently have been injured in their business and property in that, inter alia, they have paid more for lorazepam and clorazepate than they would have paid in a free and open competitive market. The States cannot quantify at this time the precise amount of damages which they have sustained, but allege that such damages are substantial. A precise determination of total damages will require discovery from the books and records of the Defendants and third parties.
>
> 105. As a direct and proximate result of the unlawful conduct alleged above, consumers in the Plaintiff States were not able to purchase lorazepam and clorazepate at prices determined by free and open competition, and consequently have been injured in that, inter alia, they have paid more for lorazepam and clorazepate than they would have paid in a free and open competitive market. The States cannot quantify at this time the precise amount of damages which their consumers have sustained, but allege that such damages are substantial. A precise determination of total damages will require discovery from the books and records of the Defendants and third parties.
>
> 106. As a direct and proximate result of the unlawful conduct alleged above, the general economies of the States have sustained injury, and are threatened with further injury to their business and property unless the Defendants are enjoined from their unlawful conduct.
>
> 107. Defendants' unlawful conduct is continuing and will continue unless the injunctive and equitable relief request is granted. The States do not have an adequate remedy at law.

23. Between 1998 and 2001, third-party payors, including HMOs, welfare plans, self-insured employers and their coverage plans, and other consumers filed substantially identical complaints against Mylan that were substantially identical to those filed by the FTC and the State Attorneys General (collectively "Purchaser Actions").

24. The FTC Action, the State Attorneys General Action, and the Purchaser Actions were resolved on February 1, 2002, when the judge in the FTC Action approved a proposed global settlement. On February 9, 2001, an order for permanent injunction was entered in the FTC Action that required Mylan to pay over $135 million.

25. Two groups of plaintiffs opted out of the global settlement. Then, on December 21, 2001, those plaintiffs filed *Health Care Service Corp., et al. v. Mylan Laboratories, Inc., et al.*, Case No. 1:01-CV-02646, in the United States District Court for the District of Columbia ("HCSC Action"). The HCSC Action ultimately resulted in a roughly $12 million verdict against Mylan.

III. CONCLUSIONS OF LAW

A. Conflicts of Law

It is well established in West Virginia that, in a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state. *See Liberty Mutual Ins. Co. v. Triangle Ind. Inc.*, 182 W.Va. 580, 390 S.E.2d 565 (1990). While AMICO first contends that the law of Pennsylvania must be applied to any determinations regarding its obligation to Mylan, it later abandons this position and argues that "[r]egardless of whether the law of West Virginia or Pennsylvania applies," there is no duty to defend Mylan under its policies. AMICO and Federal's Memorandum in Support of their joint Cross-Motion for Summary Judgment, p.14. As all other parties contend that the law of West Virginia applies, this Court finds application of West Virginia law to the issues at bar both appropriate and prudent and in accordance with the guidance provided by *Triangle Industries* and its progeny.

B. Duty to Defend

The general rule in West Virginia is that an insurer's duty to defend is tested by whether the allegations in the plaintiff's complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. *Aetna Cas. & Sur. Co. v. Pitrolo,*

176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986). An insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. *State Automobile Mutual Ins. Co. v. Alpha Engineering Ser.*, 208 W.Va. 713, 542 S.E.2d 876 (2000). *See also Farmers & Mechanics Mut. Fire Ins. Co. of West Virginia v. Hutzler*, 191 W.Va. 559, 447 S.E.2d 22 (1994). The Court rejects Mylan's assertions that, because complaints may be amended even following trial, coverage should be afforded despite the fact that the complaints in the underlying actions do not adequately specify a cause of action covered by a particular policy.

C. The Underlying Suits In The AWP Litigation Do Not Allege Advertising Injury Or "Use Of Another's Advertising Idea" As Defined By The AMICO, Continental And Wausau Policies, And Thus No Coverage Is Triggered And The Defendants Had No Duty To Defend Mylan In The Underlying Suits

The AMICO, Continental, and Wausau Policies provide that they will defend suits alleging "Advertising Injury." The AMICO and Continental Policies define "Advertising Injury" to include injury arising out of the "misappropriation of advertising ideas or style of doing business." Wausau Policies 0526-00-101388 through 0520-00-101388 define "Advertising Injury" to include injury arising out of the "misappropriation of advertising ideas." Wausau Policy 0521-00-101388 defines "Advertising Injury" to include injury arising out of "use of another's advertising idea in your 'advertisement.'" For the reasons set forth below, AMICO, Continental, and Wausau have no duty to defend the underlying suits in the AWP litigation as those suits do not allege "Advertising Injury" as that term is defined in their policies.

In order to trigger the duty to defend, the underlying plaintiff's allegations of misappropriation have to involve the taking of an **advertising idea**, not just the use of a non-advertising idea that is made the subject of advertising. *See, e.g., Green Mach. Corp. v. Zurich Am. Ins. Group*, 313 F.3d 837, 841 (3rd Cir. 2002) (finding that misappropriation of advertising

ideas means "the wrongful taking of an idea for the solicitation of business and customers"); *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 748 (3rd Cir. 1999); *see also Amazon.com Int'l, Inc. v. Am. Dynasty Surplus Lines Ins. Co.*, 85 P.3d 974, 976 (Wash. Ct. App.) (noting that "[M]isappropriation of an advertising ideas may be accomplished by the 'wrongful taking of another's manner of advertising,' by 'the wrongful talking of an idea concerning the solicitation of business and customers,' or by 'the wrongful taking of the manner by which another advertises its goods or services.'"); *Am. States Ins. Co. v. Vortherms*, 5 S.W.2d 538, 543 (Mo. Ct. App. 1999) (stating that "misappropriation of an advertising idea involves the wrongful taking of another's manner of advertising"); *Flouroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 682 (Minn. Ct. App. 1996) (same). (Pg. 3, ¶1)

In addition, in order to trigger advertising injury coverage, the underlying claims must allege the wrongful taking of the CLAIMANT'S advertising idea, not the advertising idea of some third-party. This finding is supported even by the cases cited by Mylan, wherein the plaintiffs in the underlying suits were competitors of the insured. None of the plaintiffs in the AWP Actions are competitors of Mylan's, and thus Mylan's claims that they were owed a defense based on coverage for advertising injury fails.

In this matter, none of the damage alleged in the AWP Actions is due to an "advertising injury." The damages sought in the underlying suits pertain to the alleged activities of Mylan that resulted in certain third-party payors over-paying for drugs based on Mylan's reported AWP and "marketing of the spread," not a misappropriation of someone else's advertising idea or even manner of doing business.

Mylan's argument that certain terms are ambiguous and thus the policies must be construed as providing coverage fails as, pursuant to both legal and common use,

"misappropriation" means a wrongful taking and there was no such misappropriation alleged in the underlying AWP suits. *See, e.g., Green Mach.*, *supra*, 313 F.3d at 841. Moreover, even if the Court were to adopt Mylan's assertion that the word "misappropriation" can mean "misuse," such activity must still involve an advertising idea and must be brought by the party whose idea has been misused. None of these factors is present in the AWP Actions, and thus no duty to defend the AWP Actions is triggered.

Having determined that the claims of the Plaintiffs fall outside of any coverage afforded by the relevant insurance companies, the Court need not address the issue of whether the claims fall within any named exclusions provided for in the policies. The Court therefore GRANTS the motions for partial summary judgment filed by AMICO, Continental and Wausau with regard to the duty to defend Plaintiffs in the AWP Litigation and DENIES the Motion of Plaintiffs for the same.

D. The Underlying Claims In The AWP Actions Do Not Allege Personal Injury Or Discrimination, And The Duty To Defend Is Not Triggered Under Federal's Umbrella Policy

The Federal Policies' Coverage A excess liability coverage obligates Federal to defend suits only if the applicable underlying insurance has been exhausted. The Federal Policies' Coverage B umbrella coverage obligates Federal to defend suits only if there is (1) no applicable underlying insurance and (2) the suits allege potentially covered claims under the provisions of Coverage B. Thus, Federal's duty to defend arises only if (1) coverage was afforded under one of the underlying Wausau Policies and was exhausted or (2) if no coverage was afforded by the underlying Wausau Policies in the first place and the Federal Policies' Coverage B potentially applies. Having found that no provision in the Wausau Policies covered the allegations contained in the AWP suits, only Federal's Coverage B umbrella coverage is implicated, and it

must be examined in light of the duty to defend.

The Federal Policies' Coverage B provides, in part, that Federal will defend any suit alleging "Personal Injury."[1] The Federal Policies define "Personal Injury" to include injury arising out of "discrimination."

As used in the "Personal Injury" section of the Federal policy, "discrimination" refers to the standard types of discrimination (*e.g.* race, age, handicap) and not, as asserted by Mylan, "any form of discrimination within the field of commerce," which is the definition of "economic discrimination." *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593, 624-25 (W.D. Pa. 2000) (finding that, when viewed in context with the other enumerated offenses in the definition of "personal injury," the meaning of "discrimination" is limited to differential treatment of a person based upon immutable characteristics such as race, sex, age, religion, or national origin). Thus, the dictionary definitions relied upon by Mylan do not, in fact, support Mylan's interpretation of the term, which must be read in concert with the rest of the policy language and not in a vacuum.

Even if the Court were to adopt the reasoning of *Federal Ins. Co. v. Strohs Brewing Co.*, 127 F.3d 563 (7th Cir. (Ind.) 1997), as urged by Mylan, the AWP claims do not allege price discrimination because the claimants in the underlying suits are not entities that would purchase Mylan products. Rather, the AWP claims allege fraud regarding the excessive funds Medicare, Medicaid, and third-party payors reimbursed to medical providers and pharmacies based on Mylan's alleged artificially inflated AWP listing.

As the underlying suits in the AWP Litigation do not allege discrimination, as that term is defined in the Federal Policies, Federal has no duty to defend Mylan in the AWP litigation under

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[1] Federal can have no duty to defend the underlying AWP lawsuits under its Coverage B "Advertising Injury" coverage for the same reasons that AMICO, Continental, and Wausau have no duty to defend under their "Advertising Injury" coverage. Thus, only the "Personal Injury" coverage in the Federal Policies' Coverage B is implicated with regard to Federal's duty to defend.

the Federal Policies. The Court need not and does not reach the question of whether public policy prohibits insurance for discrimination. Accordingly, the Court GRANTS Federal's Motion for Partial Summary Judgment regarding the duty to defend Mylan during the AWP Litigation and DENIES the motion of Mylan for the same.

E. Coverage For Advertising Injury Or Bodily Injury Under The Wausau Policies Are Inapplicable To This Case, And Thus Wausau Had No Duty To Defend Mylan In The L&C Litigation

For the reasons set forth below, Wausau has no duty to defend the underlying suits in the L&C Litigation as the suits do not even potentially trigger the "Advertising Injury" and/or "Bodily Injury" coverages in the Wausau Policies.

1. Advertising Injury

As noted above with regard to Wausau's duty to defend the AWP litigation, Wausau has a duty to defend suits seeking damages for covered "Advertising Injury." Wausau Policies 0526-00-101388 through 0520-00-101388 define "Advertising Injury" to include injury arising out of the "misappropriation of advertising ideas." Wausau Policy 0521-00-101388 defines "Advertising Injury" to include injury arising out of "use of another's advertising idea in your 'advertisement.'"

As with the AWP suits discussed above, Mylan fails to show that the L&C suits contain allegations of "advertising injury" causing damage to Mylan's competitors, a prerequisite to coverage for the same. None of the plaintiffs in the L & C suits are in competition with Mylan and, thus, the "Advertising Injury" coverage in the Wausau Policies cannot be triggered.

Even if the L&C suits were brought by Mylan's competitors, the L&C lawsuits do not allege "Advertising Injury" as there are no allegations of misappropriation or improper use of **advertising ideas**. *Green Mach.*, *supra*, 313 F.3d at 841 (finding that misappropriation of

advertising ideas means "the wrongful taking of an idea for the solicitation of business and customers"); *Frog, Switch, supra*, 193 F.3d at 748 (3rd Cir. 1999) (finding that an advertising idea is "an idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage"). At most, the fair pricing campaign embarked upon by Mylan, which Mylan alleges is a basis for finding "advertising injury" in this matter, can be viewed as a "dissemination or disclosure of wrongful conduct," as Mylan's exorbitant increase in pricing is characterized in the L&C complaints. *Id.* at 746 (finding that mere dissemination or disclosure of wrongful conduct through advertising does not convert the underlying harm into a form of advertising injury).

In addition, before the duty to defend can be triggered, there must be a causal connection between the activity and the injury. *Sentry Ins. Co. v. L.J. Webber Co., Inc.*, 2 F.3d 554, 557 (5th Cir. 1993); *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Systems, Inc.*, 824 F. Supp. 583, 586 (E.D. Va. 1993); *Bank of the West v. Superior Corp.*, 2 Cal. 4th 1254 (Cal. 1992); *International Ins. Co. v. Florists' Mut. Ins. Co.*, 201 Ill. App. 3d 428 (Ill. App. Ct. 1990); *A. Myers & Sons Corp. v. Zurich American Ins. Group*, 74 N.Y.2d 298 (N.Y. 1989). Thus, even if there were allegations of misappropriation or improper use of advertising ideas, there can be no "Advertising Injury" coverage if there is no causal connection or nexus between the injury and the insured's advertising activities. In this matter, the required nexus between any injury and the "advertising activity" fails, as the actual injury alleged in the underlying suits had to do with the increase in prices for Lorazepam and Clorazepate, which had already taken place before the fair pricing campaign was implemented.

2. Bodily Injury

In addition, Wausau has a duty to defend suits seeking damages for covered "Bodily

Injury" caused by an "occurrence." Wausau Policies 0526-00-101388 through 0521-00-101388 define "Bodily Injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." These Wausau Policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."

Mylan's claims that the L&C suits involve "bodily injury" fail, as no such claims are alleged in the L & C suits. Rather, the L&C suits involve economic injury, in that Mylan increased the price of Lorazepam and Clorazepate by 1,900-2,000% following its entry into the exclusive licensing agreements with ingredient suppliers. The only contention that comes close to one asserting covered "bodily injury" is Mylan's speculative assertion that some consumers may not have been able to afford their medications due to the price hikes by Mylan. However, as no such specific claims for bodily injury are alleged in any of the underlying complaints, the "Bodily Injury" coverage in the Wausau Policies is not triggered.

In addition, even if the L&C suits did allege "bodily injury" as that term is defined in the Wausau policies, the L&C suits do not contain any allegations of an "occurrence," which the policies define as an "accident" and West Virginia law construes as "an event that occurs by chance or arises from unknown causes." *Bruceton Bank v. U.S.F. & G. Ins. Co.*, 199 W.Va. 548, 554, 486 S.E.2d 19 (1997). Mylan's characterization of customers no longer able to afford medications due to Mylan's price increase of more than 1,000% is not an "occurrence" as defined by the policy. Mylan's increasing of the prices of its drugs was an intentional act, not an accident, and the consequence that some customers would no longer be able to afford Mylan's medications should have been reasonably foreseeable by Mylan. As such, any coverage under the Wausau Policies is precluded.

Having determined that the claims of the Plaintiffs fall outside of any coverage afforded by the relevant Wausau policies, the Court need not address the issue of whether the claims fall within any named exclusions provided for in the policies. The Court therefore GRANTS the Motion for Partial Summary Judgment filed by Wausau with regard to the duty to defend Mylan in the L&C Litigation and DENIES the motion of Mylan for the same.

F. The Underlying Claims In The L&C Litigation Do Not Allege Personal Injury Or Discrimination, And Thus The Duty To Defend Mylan Is Not Triggered Under Federal's Umbrella Policy

As discussed above with regard to Federal's duty to defend the AWP lawsuits, Federal's duty to defend arises in this matter only if (1) coverage was afforded under one of the underlying Wausau Policies and was exhausted or (2) if no coverage was afforded by underlying Wausau Policies in the first place and the Federal Policies' Coverage B potentially applies. Having found that no provision in the Wausau Policies covered the allegations contained in the L&C suits, only Federal's Coverage B umbrella coverage is implicated, and it must be examined in light of the duty to defend.

The Federal Policies' Coverage B provides, in part, that Federal will defend any suit alleging "Personal Injury."[2] The Federal Policies define "Personal Injury" to include injury arising out of "discrimination."

In this matter, no claim for "discrimination" is alleged in any of the L&C complaints, as those suits were in fact comprised of uncovered anti-trust, monopoly and market-cornering claims. *Great American Assurance Co. v. Riso, Inc.*, 479 F.3d 158 (1st Cir. 2007); *Curtis-Universal, Inc. v. Sheboygan Emergency Medical Services, Inc.*, 43 F.3d 1119, 1123 (7th Cir.

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[2] Federal can have no duty to defend the underlying L&C lawsuits under its Coverage B "Advertising Injury" and "Bodily Injury" coverages for the same reasons that Wausau has no duty to defend under its "Advertising Injury" and "Bodily Injury" coverages. Thus, only the "Personal Injury" coverage in the Federal Policies' Coverage B is implicated with regard to Federal's duty to defend.

1994); *Humphreys, et al. v. Niagara Fire Ins. Co., et al.*, 590 A.2d 1267, 1272 (Pa. Super. Ct. 1991).

In addition, as was the case with Federal's duty to defend the AWP claims discussed above, "discrimination" as used in the "Personal Injury" section of the Federal policy refers to the standard types of discrimination (*e.g.* race, age, handicap) and not, as asserted by Mylan, "any form of discrimination within the field of commerce," which is the definition of "economic discrimination." *USX Corp., supra*, 99 F. Supp. 2d at 624-25 (finding that, when viewed in context with the other enumerated offenses in the definition of "personal injury," the meaning of "discrimination" is limited to differential treatment of a person based upon immutable characteristics such as race, sex, age, religion, or national origin). Thus, the dictionary definitions relied upon by Mylan do not, in fact, support Mylan's interpretation of the term, which must be read in concert with the rest of the policy language.

For these reasons, Federal has no duty to defend the L&C suits under its Coverage B "Personal Injury" coverage. This Court need not and does not reach the question of whether public policy prohibits insurance for discrimination. Accordingly, the Court GRANTS Federal's Motion for Partial Summary Judgment regarding the duty to defend Mylan during the L&C Litigation and DENIES the motion of Mylan for the same.

CONCLUSION

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, this Court hereby

1. **DENIES** Plaintiffs Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc., and UDL Laboratories, Inc.'s Motions for Partial Summary Judgment as identified in paragraphs 1 and 2 of this Order;

2. **GRANTS** Defendants American Motorists Insurance Company's, Continental Insurance Company's, Wausau Insurance Company's, and Federal Insurance Company's Cross Motions for Partial Summary Judgment as identified in paragraphs 3 through 7 of this Order; and

3. **DISMISSES** with prejudice the claims in this action by Plaintiffs against American Motorists Insurance Company, Continental Insurance Company, Wausau Insurance Company, and Federal Insurance Company since, as there is no duty to defend, there can be no duty to indemnify.

All objections of counsel are duly noted.

The Circuit Clerk is directed to provide certified copies of this Order to all counsel of record.

ENTERED this 8th day of February, 2007

HONORABLE ROBERT B. STONE

PREPARED BY:

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STATE OF WEST VIRGINIA SS:

I, Jean Friend Clerk of the Circuit Court and Family Court of Marshall County State aforesaid do hereby certify the foregoing attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend Circuit Clerk